THE CORPORATION JOURNAL

(REGISTERED U. S. PAT. OFFICE)

VOL. XVI, No. 2 NOVEMBER, 1943 PAGES 25-48

COMPLETE NUMBER 303

Published by

THE CORPORATION TRUST COMPANY AND ASSOCIATED COMPANIES

In the incorporation, qualification and statutory representation of corporations, The Corporation Trust Company, C T Corporation System and associated companies deal with and act for lawyers exclusively.

What Constitutes Doing Business — Ownership of Real Estate 29

Recent Decisions

California—Substituted service—delivery by mail 30

Delaware—Appointment of receiver—laches 30
—Contingent transfer of voting power 31

Federal—Capital stock tax—doing business 40

Illinois—Attorney's fees—derivative action 32
—Doing busines—service of process 34
—Sales tax—collection from consumer 41

Indiana—Contractual liability assumed by company ... 32

Kentucky—Sale of corporate property—vote required . 33

Nebraska—Doing business—service of process 35
—Foreign company—taxation of intangibles 42

New Jersey—Attorney's fees—stockholder's suit 33

New York—Doing business—service of process 35
—Doing business—service of process 38
—Foreign corporation—mortgage—Sec. 16, S. C. L. 38

Pennsylvania—Derivative action—foreign statutes 39

THE CORPORATION JOURNAL

VOL. XVI, No. 2 NOVEMBER, 1943 PAGES 25-48

The Corporation Journal is published by The Corporation Trust Company, monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for November

Page

What Constitutes Doing Business—Ownership of Real Estate 29

Digests of Court Decisions, etc.

Domestic Corporations 30

Foreign Corporations 34

Taxation 40

Appealed to The Supreme Court 43

Regulations and Rulings 44

Some Important Matters for November and December .. 45

What Constitutes Doing Business

Ownership of Real Estate

The mere ownership of a single piece of real estate by an unlicensed foreign corporation, other than a real estate company, has been held in a number of states not to amount to the doing of business by the corporation so as to require it to obtain authority to do business.[1] Exceptions to this type of ruling may, however, be noted.

In 6 states, Colorado, Florida, South Dakota, Washington, West Virginia and Wisconsin, there are statutes to the effect that no foreign corporation shall acquire, hold or dispose of property in the state until it has complied with the qualification requirements.

In 2 states, Idaho and Utah, there are statutory provisions denying an unlicensed foreign corporation doing business power to hold real property prior to qualification.[2]

In 3 additional states, Illinois, Kentucky and Oregon, the ownership of real estate by an unlicensed foreign corporation has been held to constitute "doing business" so as to require qualification on the part of the corporation.[3]

There are states in which, if a foreign corporation has carried on business in the state prior to entering into a contract in the state for the purchase or sale of real property there, it may find the courts of the state closed to it, by statute, if it desires to use the courts to enforce the contract—even though the corporation is subsequently licensed to do business there.[4]

---

[1] *Martin v. Bankers Trust Co.*, (1916) (Ariz.) 156 Pac. 87; *Hooker v. Southwestern Improvement Assn.*, (1912) (Ark.) 150 S. W. 398; *Davies et al. v. Mt. Gains Mining & Milling Co.*, (1930) (Cal.) 286 Pac. 740; *North Dakota Realty & Investment Co. v. Abel*, (1927) (Ind.) 155 N. E. 46; *Blodgett v. Lanyon Zinc Co.*, (1903) (Kansas) 120 Fed. 893; *Electric Ry. Securities Co. v. Hendricks et al.*, (1930) (Mich.) 232 N. W. 367; *Parker v. Wear*, (1921) (Mo.) 230 S. W. 57; *Uihlein v. Caplice Commercial Co.*, (Mont.) (1909) 102 Pac. 564; *Booldin et al. v. Taylor et al.*, (Tenn.) (1925) 278 S. W. 340; *Wilson v. Peace*, (1905) (Texas) 85 S. W. 31.

[2] In New York, by statute, the mere ownership of real property in the state is made the equivalent of "doing business" for the purpose of the franchise taxes imposed upon ordinary business corporations and real estate and holding companies. (Tax Law, Art. 9, Secs. 182 and 188, and Art. 9-A, Sec. 209.)

[3] *Penna. Co. for Insurance on Lives v. Bauerle*, (Ill.) 33 N. E. 166; *Greene v. Kentenia Corp.*, (Ky.) 194 S. W. 820; *Weiser Land Co. v. Bohrer*, (Ore.) 152 Pac. 869.

[4] Alabama, Arizona, Arkansas, Idaho, Iowa, Michigan, Mississippi, Missouri, New York, Oklahoma, South Dakota, Texas, Utah, Vermont, Wisconsin and Wyoming. As to foreign corporations organized in the states just named, New Jersey may be regarded as imposing a similar rule under the decision in *Babe Kaufman Music Corp. v. Mandia et al.*, 13 A. 2d 790, (The Corporation Journal, October, 1940, page 230).

Domestic Corporations

California.

Statutory provision for substituted service on Secretary of State, to be effected "by delivering" the process, ruled not complied with by mailing of process to that official, personal delivery being necessary. Defendant California corporation moved to quash service of the summons and complaint in an action in which a judgment by default was subsequently obtained against it. Plaintiff, having been unable to effect personal service upon defendant's officers had *mailed* a copy of the summons and complaint by registered mail to the Secretary of State, after obtaining a court order which directed service "by delivering" such copy to that official. The statute, Code Civ. Proc. sec. 411, pursuant to which the court order was made, also directed service, under such cirumstances, be effected "by delivering" the copy to the Secretary of State. The question was whether by mailing the copy, plaintiff had complied with the provision requiring that service be effected "by delivering" the process. The Supreme Court of California ruled that proper service had not been made and reversed the judgment, concluding that personal delivery to the Secretary of State or one of his deputies was required. *Hunstock v. Estate Development Corporation,* 138 P. 2d 1. Commerce Clearing House Court Decisions Requisition No. 304319. Dryer, Richards & Page of Los Angeles, for appellant. Crail, Crail & Crail of Los Angeles, for respondents.

Delaware.

Receiver appointed under circumstances where bill was filed more than three years after dissolution of corporation. Defendant Delaware corporation had been dissolved by proper corporate action under Sec. 39, General Corporation Law, on March 13, 1940. Complainant stockholders sought the appointment of a receiver by the Court of Chancery for the main purpose of enabling him to intervene in an action pending in the State of New York. In that action stockholders sought to recover a large sum of money on behalf of the corporation from former directors and others for the alleged mismanagement of its affairs, in inducing a sale of all of its assets at a price far below their value. The bill was not, however, filed until May 6, 1943, or more than three years after the dissolution, and, approximately three and one-half years after the preliminary contract of sale had been made. Defendant corporation claimed, in support of its demurrer, that it appeared from the face of the bill that complainants had been guilty of laches in seeking the appointment of a receiver. The court overruled the demurrer, observing: "Under Section 43, and notwithstanding Section 42, of the General Corporation Law, the power of this Court to appoint a Receiver for a dissolved corporation, in a proper case, is not limited to three years from its dissolution (*Slaughter v. Moore,* 9 Del. Ch. 350; *Harned*

v. Beacon etc. Real Est. Co., 9 Del. Ch. 322); by its express provisions, the appointment may be made 'at any time,' within the discretion of the Court." The court, having noted that there were no creditors and that the preferred stock had been redeemed, indicated that the following rule applied to this case: "Mere lapse of time, without any change in position making the action of a Court unfair and inequitable, seldom constitutes laches, barring the relief sought by a bill." *Levin et al. v. The Fisk Rubber Corporation*, 33 A. 2d 546. Commerce Clearing House Court Decisions Requisition No. 307858. W. Reese Hitchens of Hering, Morris, James & Hitchins of Wilmington, for complaints. Aaron Finger of Richards, Layton & Finger of Wilmington, for defendant.

Charter provision for transfer of sole voting powers to preferred stock and for reversion of those powers to the common stock, each upon stipulated contingencies, construed. Recently, the Court of Chancery, New Castle County, had occasion to construe a charter provision under which the sole right to vote for the election of directors and for all other purposes was to be transferred from the common to the preferred stock upon a two-year default in preferred stock dividends. Such a transfer of voting rights took place in 1936, due to the fact that the corporation was in default in the declaration and payment of preferred dividends in the amount of more than two years' dividends at that time. The charter also contained provision that the right to vote for the election of directors and for all other purposes was to revert to the holders of the common stock when "the corporation shall have declared and paid for a period of a full year a 6% dividend on the preferred stock." Various amounts of dividends were subsequently paid. In June, 1941 and every three months thereafter, except in 1943, dividends of 1½% each were paid to the preferred stockholders, aggregating 10½%. In June, 1942, and again in September and December, 1942, the corporation was in the situation of having paid "for a period of a full year a 6% dividend on the preferred stock." However, the cumulative dividends in arrears at the end of 1942 were 37½% or more than 6 years' dividends. At the disputed election in April, 1943, both common and preferred stockholders attempted to elect directors. The petitioner, a holder of common stock, sought in this action to determine which slate had been validly elected. The court ruled in favor of the preferred stock, concluding that, under the charter provision, "the preferred holders are authorized to elect to exercise voting power at any time when preferred dividends are in default in the amount of two years' dividends, regardless of when they may have accrued." *Ellingwood v. Wolf's Head Oil Refining Company, Inc. et al.*, 33 A. 2d 409. Commerce Clearing House Court Decisions Requisition No. 307552. William S. Potter of Southerland, Berl & Potter of Wilmington, and John T. Carpenter of New York City, for petitioner. William Prickett of Wilmington, John G. Buchanan and Milton W. Lampropolos of Smith, Buchanan & Ingersoll of Pittsburgh, Pa., and Harold T. Parker of Oil City, Pa., for the corpo-

ration and for certain respondents. David F. Anderson of Southerland, Berl & Potter for other respondents.

Illinois.

Plaintiff, successful in stockholder's derivative action, ruled entitled to attorney's fees out of funds recovered. In a stockholder's derivative action to compel individual defendants to restore to the corporation moneys allegedly unlawfully appropriated by the individual defendants as officers and directors, it was decreed that three defendants repay $3,600. Further effort was pending in the action to secure a return of $13,997.52 from another defendant under an uncompleted accounting required of him. Plaintiff appealed from that part of a decree of the Chancellor denying plaintiff's right to recover attorneys' fees out of the money ultimately to be recovered. This the Appellate Court of Illinois, First District, Third Division, reversed, with directions to the trial court to retain jurisdiction of the question until after the court had passed upon the accounting and that it then decide and determine the reasonable value of plaintiff's attorney's fees and make allowance therefor from the moneys received by the company as a result of the institution and prosecution of the suit. In the course of its opinion, the court made the following observations: "The question of a stockholder's right to recover attorneys' fees has been passed upon many times in other jurisdictions and the general rule is clearly and tersely announced in Vol. 13, Fletcher Cyclopedia on Corporations, Sec. 6045, page 363, where the author says: 'The general rule is that if the plaintiff in a stockholders' suit is successful and the benefit goes to the corporation, he is entitled to recover his necessary expenses and disbursements, including an attorney's fee.'" "In view of the unanimity of opinion in other jurisdictions and the rule of law laid down in cases cited in our opinion there is no good reason upon which to base a refusal to allow attorney's fees in this case." *Bingham v. Ditzler et al.*, 49 N. E. 2d 812. John J. Healy of Chicago, for appellant. Thompson, Chambers & Thompson (Lavern W. Thompson, of counsel) of Chicago, for appellees.

Indiana.

Contract between individuals, calling for assumption of liability of one party under it by a corporation to be organized, held liability of corporation where subsequent conduct of parties indicated they recognized company as so liable. The United States Circuit Court of Appeals, Seventh Circuit, has indicated that a corporation was to be regarded as liable under a contract entered into prior to its incorporation between the plaintiff and the defendant, involving the rendering of personal services by the plaintiff, signed by the defendant as "Trustee," under which it was provided that upon the formation of the corporation the contract was to become the property and obligation of the corporation and that defendant was to be relieved

thereupon from liability individually and as trustee. The corporation was organized and plaintiff subsequently sought to hold defendant liable individually. A judgment for the defendant was affirmed, the court emphasizing that the conduct of the parties subsequent to the incorporation strongly indicated that they recognized the company as solely liable for performance of the contract. *Patch v. Stahly*, 135 F. 2d 269. A. Trevor Jones of Chicago, Ill., for appellant. Walter R. Arnold and Arnold, Degnan, Goheen & Zimmerman of South Bend, Ind., for appellee. *(Petition for writ of certiorari filed in the Supreme Court of the United States, July 21, 1943; Docket No. 186. Certiorari denied, October 11, 1943.)*

Kentucky.

Court of Appeals interprets statute requiring three-fourths vote of stockholders for sale of "any" corporate property to relate to "all" the corporate property, deeming such consent as not required where reasonable amount of property is sold in usual course of business. Subsection 1 of Section 271.320, Kentucky Revised Statutes, provides that "any corporation may sell and convey any of its property, rights," etc., and subsection 2 contains provision relative to the necessity for obtaining consent of the holders of not less than three-fourths of the capital stock of the vendor corporation and the rights of dissenting stockholders. The comparable law, prior to the enactment of the Revised Statutes in 1942, provided that a corporation could sell and convey "all" of its property, rights, etc. Plaintiff stockholder, seeking a declaratory judgment whether defendant was prohibited by statute from selling "any" of its property without consent of three-fourths of its stockholders, raised the question with regard to the sale of real property of defendant in Birmingham, Alabama, worth approximately $140,000, defendant's capital stock, surplus and undivided profits being in excess of $6,700,000. The Court of Appeals of Kentucky came to the following conclusion: "It is our view that the chancellor correctly adjudged that the word 'all' should be substituted for the word 'any' in KRS 271.320, in order to carry out the purpose intended by the legislature. A corporation may sell a reasonable amount of its property in the usual course of its business without the consent of the owners of three-fourths of its capital stock, but may not sell all of its property without obtaining such consent. The Southeastern may sell the aforementioned real estate in Birmingham without obtaining the consent of three-fourths of the owners of its capital stock." *Swift v. Southeastern Greyhound Lines*, 171 S. W. 2d 49. Charles Wylie of Lexington, for appellant. Stoll, Muir, Townsend, Park & Mohney and Keenon & Odear of Lexington, for appellee.

New Jersey.

Counsel fees and other expenses allowed complainant who was successful in action brought to restrain payment of common stock

dividend pending provision for deficiency in dividends on preferred stock for a prior year. In an action in which a Vice Chancellor restrained a corporation from making payment of a dividend which had been declared upon its common stock until the company provided for a deficiency in dividends upon its 7% non-cumulative preferred stock for a previous year to the extent that the surplus net profits for that year were sufficient to pay the deficiency, *(Cintas v. American Car & Foundry Co.,* 25 A. 2d 418, affirmed, 28 A. 2d 531, The Corporation Journal, June, 1942, page 199), the Vice Chancellor ruled that the successful complainant was entitled to have counsel fees allowed from the fund brought under the control of the court as a result of the suit. In addition, the defendant company was directed to pay a counsel fee covering the appeal to the Court of Errors and Appeals and to pay certain sums to complainant's accountants and for the printing of briefs in the higher court. *Cintas v. American Car & Foundry Co.,* New Jersey Chancery Court, May 6, 1943. Commerce Clearing House Court Decisions Requisition No. 304329.

Foreign Corporations

Illinois.

Corporation storing goods locally, sales being effected for it by the custodian, held subject to service of process. Defendant unlicensed foreign corporation, which had for eight years stored its products with a warehouse company in Illinois, from which deliveries were made by the warehouse company to an approved list of defendant's customers, sought to quash service of summons made upon the manager of the warehouse company as defendant's agent. The Appellate Court of Illinois, First District, Third Division, said: "The question in this case is whether the defendant company at the time of the service of the summons was 'doing business' in the State of Illinois, and whether Johnson was a proper person to serve. The issue arises out of the due process clause of the 14th Amendment to the Federal Constitution. The term 'doing business' has a different meaning when considering a state's right to tax or license than when considering process of state courts; and we are not concerned with the interstate character of the business, for even if engaged solely in interstate commerce in Illinois, it is amenable to the process of State Courts." "There was not only a continuous solicitation of orders and continuous shipment into Illinois in response thereto, so as to make the International Harvester Company v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (Day) and Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (Cardozo) apply, but there was in addition a stock of merchandise maintained here, more or less permanently, from which local jobbers were sold. The sales to local jobbers were made without notice to the company and the last act being done here, Illinois is the place of the contract. Johnston v. Industrial Comm., 352 Ill. 74, 185 N. E. 191. We cannot say that any local jobbers would have to go to Pennsylvania to sue on a right arising out of such sales, nor that

plaintiff should be compelled under the circumstances here to sue in that State. It is our opinion that the company was here, subject to process of Illinois courts, and that Johnson was its agent upon whom service could be had under our practice." *Pergl et al. v. U. S. Axle Co. et al.*, 50 N. E. 2d 115. Gardner, Carton & Douglas (Erwin W. Roemer and James A. Velde, of counsel), of Chicago, for appellant. Baker, Holder & Hagstrom (Joseph G. Hagstrom and Edward J. Murray, of counsel), of Chicago, for appellee.

Nebraska.

Unlicensed corporation, entering into a single contract, ruled not subject to service of process. Plaintiff, a Nebraska attorney, was employed by defendant unlicensed Delaware corporation, which was engaged in business as a broker in buying and selling municipal and other securities, to represent it in connection with the financing of the sale of a toll bridge across the Missouri River, owned by another Delaware company. Plaintiff sued to recover for services so rendered, service of process upon the defendant being made upon the State Auditor. Defendant filed a special appearance and the lower court quashed the summons and dismissed the petition and from this order plaintiff appealed. The ruling was affirmed by the Supreme Court of Nebraska on the ground that defendant had entered into a single contract or isolated transaction which did not amount to the doing of business in the state. In concluding its opinion, the court observed, however, that while there might be cases "where a single contract creates a situation when it can be said that the party has thereby engaged in business in this state, however, we do not find, from the facts set forth in plaintiff's petition, as amended, that the defendant here did so," the court remarking that "there is nothing to show that any other contract was entered into either before or after or that this defendant intended in any manner to come into this state to carry on its business. The contract set forth involved a considerable amount of money but did not require the defendant to come into this state and set up an office, hire employees, appoint agents or do the things generally done in connection with engaging in business." *Pitzer v. Stifel, Nicolaus & Co., Inc.*,* 9 N. W. 2d 495. Lloyd E. Peterson and Varro E. Tyler of Nebraska City, for appellant. Finlayson, Burke & McKie of Omaha, for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service**, Nebraska, page 505.

New York.

Service set aside where made upon corporation soliciting orders from New York office which were approved and executed at point out of state from which collections were also made. Service upon defendant corporation was made upon Edmund S. Bishop, plaintiff's assignor, who either was at the time, or had previously been, a vice-

have the Corporation Trust system I can
attorney, just how each different type
rest easy in the knowledge that it will
statutory agent and designated address
and address, and there'll never be a
there's a state report your company
C T will send an advance notificati
State and Local, will give all the
about your having a clean bill of
may have a contract to enforce or

tate in advance, as your company's
rocess shall be handled and can
handled that way; the designated
each state will be the C T agent
about a possible hiatus; when
file or a state tax it must pay,
it and the Corporation Tax Service,
ils of it so I'll never be in doubt
rate health in any state in which we
im to bring suit on. As your lawyer I

president of defendant. An office was leased in New York in the name of Bishop, defendant contributing $15. each month toward the expense of maintaining the office. The company's name was shown on the door and listed in the telephone book. Orders and bids obtained were sent to Chicago to be acted upon and filled by shipment from outside New York. All invoices were sent out from Chicago and payments were made to that office. The United States District Court, Southern District of New York, remarking that the evidence was inconclusive as to whether Bishop was or was not a vice-president at the time of service, concluded that defendant was not doing business in New York and was not amenable to process of the court. *Bishop v. Everson Manufacturing Co.,** United States District Court, Southern District of New York, June 10, 1943. Commerce Clearing House Court Decisions Requisition No. 306608. William L. Bowman of New York City, for plaintiff. Willkie, Owen, Otis, Farr & Gallagher (Mark F. Hughes, of counsel), of New York City, for defendant.

*The full text of this opinion is printed in **The Corporation Tax Service**, New York, page 20,792.

Service upon unlicensed foreign corporation, with only a soliciting agent in state, set aside by Federal court. Defendant unlicensed foreign corporation moved to vacate service of process effected upon it by serving as its agent a non-resident who solicited orders in New York for defendant, which were then sent to defendant outside the state for acceptance and completion. Defendant permitted the non-resident to represent he was a vice-president of the corporation, although he was not. The United States District Court, Southern District of New York, granted the motion, concluding that service under such circumstances did not confer jurisdiction over the corporation, the record failing to disclose that the defendant was doing business in the state at the time of the attempted service, as all acts, aside from the solicitation with respect to its business transactions, were done outside of New York. *Apgar v. Sparks Machine Tool Corp. et al.,** United States District Court, Southern District of New York, April 19, 1943. Commerce Clearing House Court Decisions Requisition No. 302000. McCormick & Eckel (Andrew Eckel, of counsel), of New York City, for plaintiff. Joseph M. Cohen, for defendant.

*The full text of this opinion is printed in **The Corporation Tax Service**, New York, page 20,771.

Sec. 16, Stock Corporation Law, governing the mortgaging of property of a domestic corporation, held inapplicable to a foreign corporation. Plaintiff loaned $150,000 to a New Jersey corporation, one of the defendants, secured in part by the pledge of that corporation, as owner, of all the shares of the capital stock of defendant Eastern Terra Cotta Realty Corporation, a New York company. Subsequently the latter conveyed its sole asset, a parcel of realty, to the New Jersey company. The effect of the conveyance, if upheld, would have been to render the pledged shares of stock worthless as

security. Plaintiff sought to restrain the conveyance of the property by either defendant and to vacate the conveyance mentioned on the ground of lack of consideration and fraud. Defendants alleged the pledge was void as the stockholders of the New Jersey corporation did not consent to it, as required by Section 16 of the New York Stock Corporation Law which permits, among other things, a corporation to mortgage its property to secure its obligations upon consent of holders of "not less than two-thirds of the total number of shares outstanding entitled to vote thereon." The New York Supreme Court, Appellate Division, Second Department, however, affirmed a judgment dismissing the defense, saying: "The defense is insufficient. It is alleged in the answer that Terra Cotta is a New Jersey corporation. The term 'stock corporation,' as used in the Stock Corporation Law, refers to domestic corporations, and our statutes regulating corporations are inapplicable to foreign corporations. Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932; Muck v. Hitchcock, 212 N. Y. 283, 106 N. E. 75, Ann. Cas. 1915D, 566; Armstrong v. Dyer, 268 N. Y. 671, 198 N. E. 551; Ernst v. Rutherford & Boiling Springs Gas Co., 38 App. Div. 388, 392, 56 N. Y. S. 403. There is no presumption that the law of the State of New Jersey on this subject is the same as that of the State of New York, as contended by appellants. The presumption is that the common law of states and countries which adopted the common law of England is the same as our own, for it originated at the same source. Smith v. Compania Litografica De La Habana, 127 Misc. 508, 512, 217 N. Y. S. 3; affirmed 220 App. Div. 782, 222 N. Y. S. 902. The presumption, however, does not apply to statutory law. Vanderpoel v. Gorman, supra, 140 N. Y. page 568, 35 N. E. 932. Under the common law of this State, a corporate mortgage was valid without the consent of stockholders. De Ruyter v. St. Peter's Church, 3 N. Y. 238; Market & Fulton Nat. Bank Of New York v. Jones, 7 Misc. 207, 27 N. Y. S. 677, affirmed 90 Hun 605, 35 N. Y. S. 1111." The court also observed that "the statute concerns itself with a mortgage and not with a pledge" and that the statute, "being in derogation of common law, cannot be construed to comprehend a pledge." *Reconstruction Finance Corporation v. Eastern Terra Cotta Realty Corporation et al.*, 41 N. Y. S. 2d 569. Commerce Clearing House Court Decisions Requisition No. 302910. Herman A. Benjamin, of New York City, for the appellants. Sol A. Liebman (George H. Feirberg, on the brief), of New York City, for the respondent.

Pennsylvania.

Federal Court of Appeals upholds dismissal of stockholder's derivative suit seeking to apply to a Delaware company statutes of Massachusetts and New York limiting the extent of a corporation's investments in stock of domestic railroad companies. In *Steckler v. Pennroad Corporation et al.*, 44 F. Supp. 800, (The Corporation Journal, November, 1942, page 256), the United States District Court, E. D., Pennsylvania, dismissed a stockholder's derivative suit seeking

to apply to a Delaware company statutes of Massachusetts and New York limiting the extent of a corporation's investments in stock of domestic railroad companies. Upon appeal, the United States Circuit Court of Appeals, Third Circuit, has affirmed the judgment of the District Court, observing that, as to Massachusetts, its highest court had ruled that the limitation was applicable to Massachusetts companies only and that, as to New York, the subject-matter of the statute limiting the stockholding "concerns the regulation of corporate activity in New York and the regulatory power of that state's Public Service Commission, matters with which another state had nothing to do. Under these circumstances we think such an action would not be entertained in the state courts of Pennsylvania nor can it be maintained by a federal court in the District of Pennsylvania having jurisdiction because of diversity of citizenship." *Steckler v. Pennroad Corporation et al.*, 136 F. 2d 197. James H. Molloy of Philadelphia (James Howard Molloy of Philadelphia and Emil Weitzner, Joyce N. Feldman and Eugene M. Parter of New York City, on the brief), for appellant. R. Sturgis Ingersoll of Philadelphia (C. B. Heiserman of Philadelphia, Elder W. Marshall of Pittsburgh, W. Heyward Myers, Jr., Lewis M. Stevens, Thomas Stokes, Ballard, Spahr, Andrews & Ingersoll, Morgan, Lewis & Bockius, Pepper, Bodine, Stokes & Schoch and Stradley, Ronon, Stevens & Young of Philadelphia, on the brief), for appellees.

Taxation

Federal.

Corporation receiving royalties under lease ruled to be doing business so as to be subject to the capital stock tax. Defendant corporation was unsuccessful in the lower court, the United States District Court for the Northern District of California, Southern Division, in recovering a Federal capital stock tax which had been paid in connection with its capital stock tax return filed for the year ending June 30, 1939, the company contending that it was not carrying on business during the year, within the meaning of the statute. The corporation was organized in 1937 for the purpose of acquiring the interest of tenants in common to certain land situated in Fresno County, California. It acquired the property and issued its stock therefor to the tenants in common. In June of 1938 it entered into a lease with a Delaware corporation, granting the exclusive right to explore, drill for, produce, treat, sell, etc. all oil and gas, asphaltum and other hydrocarbons therein for twenty years and for so long thereafter as oil, gas, etc. continued to be produced, upon a royalty basis. The first royalties were paid in October 1938. By June 30, 1939, the appellant company had received oil royalties amounting to $29,409.29 and gas royalties of $22.35. Appellant had no other income except a nominal sum received for rights of way pursuant to a custom of the oil industry. The United States Circuit Court of Appeals affirmed the lower court, concluding that the appellant

was doing business under the terms of Section 601(a) of the Revenue Act of 1938 and was liable for the tax assessed. In its opinion that court made the following observation: "We agree with the other courts which have considered this problem that there is, perhaps, no precise formula whereby all cases under the statute might readily be resolved, and that each case must be decided upon its own facts. But we do believe that, drawing upon the published decisions, we might venture to state a principle whereby the applicability of the tax may be gauged. This principle might be stated as follows: If a corporation was organized for profit and was doing what it was principally organized to do in order to realize a profit, no special volume of business is necessary to bring it within the taxing act—a very slight activity may be deemed sufficient to constitute 'doing business.'" *Section Seven Corporation v. Anglim,** 136 F. 2d 155. Louis H. Brownstone of San Francisco, Cal., for appellant. Samuel O. Clark, Jr., Asst. Atty. General, Sewall Key, Paul S. McMahon and Louise Foster, Sp. Assts. to Atty. General, and Frank J. Hennessy, U. S. Atty., and Esther B. Phillips, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

* The full text of this opinion is printed in the **CCH Standard Federal Tax Service—1943—¶ 9459.**

Illinois.

Illinois Supreme Court holds Retailers' Occupation (Sales) Tax not collectible by a retailer from the consumer when added as a separate charge to the agreed price of merchandise sold, where there was no express or implied agreement to pay the added tax. In *People's Drug Shop, Inc. v. Moysey,* 45 N. E. 2d 979, (The Corporation Journal, March, 1943, page 350), the Illinois Appellate Court, First District, ruled that a purchaser was not liable for the Retailers' Occupation (Sales) Tax when added as a separate item by the seller. Upon appeal, the Illinois Supreme Court observed: "The sole question presented for decision is whether a person engaged in selling tangible personal property at retail may collect from the consumer the retailers' occupation tax when added, as here, as a separate and distinct charge to the agreed price of merchandise sold. Defendant neither expressly nor impliedly agreed to pay the tax added. On the other hand, it affirmatively appears that he consistently refused to pay the additional charge and plaintiff continued to sell him merchandise despite his persistent refusal." Affirming the judgment, the court concluded: "Unambiguous provisions of the Retailers' Occupation Tax Act proclaim, and the decisions of this court uniformly hold, that the tax imposed is upon retailers and not upon consumers, and that the sole duty of paying the tax rests upon the former. It follows necessarily that plaintiff was without legal authority to collect from its customer, the defendant, the challenged items in its invoices representing additional charges for retailers' occupation tax." The judgment of the Appellate Court was affirmed. *People's Drug Shop,*

*Inc. v. Moysey,** Illinois Supreme Court, September 21, 1943. Commerce Clearing House Court Decisions Requisition No. 308908.

* The full text of this opinion is printed in **The Corporation Tax Service, Illinois, page 6659.**

Nebraska.

Foreign corporation with branch office in state, controlled from home office in another state, ruled not taxable on intangibles arising in connection with the branch office. The Nebraska Supreme Court recently held a foreign manufacturing corporation with a branch sales office in Nebraska not taxable upon its open accounts, dealer's notes and conditional sales contracts related to that office, under conditions where the notes and sales contracts were payable at the home office in Wisconsin, and where all such notes and contracts received were immediately sent to the home office and all cash received was deposited to the account of the home office, with no local authority to check against it. All matters other than a petty cash account for minor miscellaneous expenses were directed from the home office. The court concluded that the manner in which the branch office was operated did not bring the company within that portion of Section 77-703, Comp. St. Supp. 1941, requiring a report relative to intangibles to be filed by "every person or corporation having intangible property in his or its custody" in the state. It applied the general rule that "the situs of intangible personal property for the purposes of taxation is the domicile of the owner." Referring to those sections of the statute which required intangibles to be returned and assessed in the county where the taxpayer "resides" or has his or its "domicile," the court observed that the intangibles in question were not taxable in Nebraska because the company had no residence or domicile in the state. The court made a reference to "business situs" in the following language: "While those decisions from other jurisdictions, which find the facts to bring the party within the provisions of a statute which makes provision for taxing the intangibles of non-residents on a basis often referred to as a 'business situs,' and discussing their constitutionality with reference to double taxation, present some interesting propositions of law, they are in no way applicable here and we do not discuss that question for under the express provisions of our statutes taxing the intangibles of residents or those domiciled within this state the class B intangibles of the appellee are not included and therefore were not subject to taxation." *Massey-Harris Co. v. County of Douglas,** 12 S. C. J. 566. Commerce Clearing House Court Decisions Requisition No. 307602.

* The full text of this opinion is printed in **The Corporation Tax Service, Nebraska, page 2502.**

Appealed to The Supreme Court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

ARKANSAS. Docket No. 311. *McLeod, Commissioner of Revenues v. J. E. Dilworth Company et al.*, 171 S. W. 2d 62. (The Corporation Journal, October, 1943, page 16.) Gross receipts tax—solicitation by traveling representatives, followed by shipment into state in interstate commerce. **Petition for writ of certiorari filed, August 31, 1943.**

CALIFORNIA. Docket No. 76. *Dant & Russell, Incorporated v. Board of Supervisors of the County of Los Angeles*, 133 P. 2d 817. (The Corporation Journal, June, 1943, page 422.) State personal property taxes assessed against lumber imported from the Philippine Islands. **Petition for certiorari filed, June 1, 1943. Certiorari denied, October 11, 1943.**

DELAWARE. Docket No. 250. *The National Supply Company v. Leland Stanford Junior University et al.*, 134 F. 2d 689. (The Corporation Journal, October, 1943, page 7.) Negligence of stockholder in failing to study summary of consolidation plan—laches. **Petition for certiorari filed, August 9, 1943. Certiorari denied, October 18, 1943.**

INDIANA. Docket Nos. 164, 165 and 166. *Holland Furnace Co. et al. v. Department of Treasury of the State of Indiana*, 133 F. 2d 212. (The Corporation Journal, April, 1943, page 379.) Solicitation and delivery of merchandise to customers in Indiana—contracts to perform work and furnish materials. **Petitions for certiorari filed, July 15, 1943. Certiorari denied October 11, 1943.**

INDIANA. Docket No. 186. *Patch v. Stahly*, 135 F. 2d 269. (The Corporation Journal, November, 1943, page 32.) Contracts—liability of corporation on contract signed by individual as trustee. **Petition for certiorari filed, July 21, 1943. Certiorari denied, October 11, 1943.**

INDIANA. Docket No. 355. *Department of Treasury of Indiana et al. v. International Harvester Co. et al.*, 47 N. E. 2d 150. (The Corporation Journal, June, 1943, page 423.) Gross income tax—sales effected by branch offices outside Indiana to dealers and users located in Indiana. **Appeal filed, September 15, 1943.**

KENTUCKY. Docket No. 154. *Anderson National Bank et al. v. Reeves*, 170 S. W. 2d 370, 575. (The Corporation Journal, October, 1943, page 9.) Validity of Kentucky Escheat Act of 1940. **Appeal filed, July 12, 1943. Jurisdiction noted, October 11, 1943.**

MINNESOTA. Docket No. 33. *Northwest Airlines, Inc. v. State of Minnesota*, 7 N. W. 2d 691. (The Corporation Journal, March, 1943, page 351.) State taxation—assessment of Minnesota personal property tax against entire fleet of airplanes operated by Minnesota corporation in interstate commerce. **Petition for certiorari filed, April 2, 1943. Certiorari granted, May 10, 1943. Argued, October 18 and 19, 1943.**

MINNESOTA. Docket No. 291. *Union Brokerage Co. v. Jensen et al.*, 9 N. W. 2d 721. (The Corporation Journal, October, 1943, page 14.) Unlicensed foreign customhouse brokerage corporation—doing business—right to sue. **Petition for certiorari filed, August 26, 1943. Certiorari granted, October 11, 1943.**

TEXAS. Docket No. 257. *Federal Crude Oil Company v. The State of Texas*, 169 S. W. 2d 283. (The Corporation Journal, June, 1943, page 428.) Texas franchise tax—liability of Texas company for tax during time right to do business was forfeited for failure to pay franchise tax. **Petition for certiorari filed, August 12, 1943. Certiorari denied, October 11, 1943.**

---

* Data compiled from **CCH U. S. Supreme Court Service, 1943-1944.**

Regulations and Rulings

COLORADO—The Chief of the Taxation Bureau has observed that the income tax statute makes no distinction between the allocation of income between manufacturing, sales, contracting and service corporations. (Colorado CT (Corporation Tax) Service, ¶ 16-075.)

GENERAL—Where it is desired to effect, before the end of the calendar year, either the withdrawal of a foreign corporation from a state in which it has been authorized to do business or the dissolution of a domestic corporation, counsel have usually found that it is advisable to initiate the dissolution or withdrawal proceedings in most states as early as possible. Thus, if there are time-consuming requirements with which compliance must be had, ample provision may be made to satisfy such requirements before the end of the year. Frequently such requirements call for the preparation of income and other tax reports, the auditing of the corporate books, or the obtaining of certificates from various state departments that all taxes due the state have been paid. Inasmuch as, in some instances, a month or more may be consumed in effecting such compliance, it is advisable to investigate and institute dissolution or withdrawal proceedings, wherever possible, well in advance of the close of the year.

GEORGIA—In effecting apportionment of the income tax on corporations, property stored by a Georgia corporation in public warehouses outside the state for the purpose of filling orders in other states should not be considered as property owned and used by the corporation in connection with business done in Georgia. (Opinion of Attorney General to the Commissioner of Revenue, Georgia CT, ¶ 14-540.)

MARYLAND—Property taxes paid to the District of Columbia are not deductible for Maryland income tax purposes as taxes paid to the United States. (Opinion, Attorney General of Maryland to State Comptroller, Maryland CT, ¶ 17-053.)

A chain store tax license is required in every case where two or more stores selling goods at retail are operated within the State under the same general supervision and control, and it is immaterial that the type of goods sold at one store differs from that sold at the other. (Opinion, Attorney General, Maryland CT, ¶ 45-507.)

MISSOURI—The Attorney General has ruled that the 1943 Constitutional amendment adopted with respect to the effective dates of laws enacted by the Legislature was negative in character and did not have the effect of repealing the statutory provision; that bills enacted and approved prior to adjournment, August 23, 1943, become effective November 22, 1943, and that bills approved subsequent to adjournment become effective 90 days after such approval, bills containing an emergency clause not being affected. (Missouri CT, page 9021.)

WISCONSIN—A corporation organized under the laws of Delaware but having its principal office and place of business in Wisconsin is treated as a resident of Wisconsin for purposes of taxation of personal property in Wisconsin. (Opinion of Attorney General, Wisconsin CT, ¶ 24-157.)

Some Important Matters for November and December

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

ALASKA—Annual Corporation Tax due on or before January 1.—Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January. —Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and January 20.—Domestic Corporations.

Application for license in connection with District Income Tax due on or before January 1.—Domestic and Foreign Corporations.

GEORGIA—Annual License Tax Report and Tax due on or before January 1.—Domestic and Foreign Corporations.

NEW YORK—Second Installment of Franchise (Income) Tax of Business Corporations due on or before November 15 (or within 30 days after notice, if given later than October 15; payable not later than January 15, in any event).—Domestic and Foreign Business Corporations other than real estate and holding companies.

Supplementary Franchise Tax Return (Form 60 CT) due on or before November 30.—Domestic and Foreign Corporations organized or qualified between May 14 and November 1 of current year.

UNITED STATES—Fourth Installment of Income Tax imposed for the calendar year 1942 due on or before December 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.

The Corporation Trust Company's Supplementary Literature

In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York, N. Y.

Cross-Hauling . . . and the Answer, Spot Stocks. Explains how the possible wartime restrictions on cross-hauling point the way to volunteer peacetime economies through the keeping of warehouse stocks at strategic shipping points.

Amendments to Delaware Corporation Law, 1943. Contains complete text of the amendments adopted at the 1943 session of the legislature, giving for each one a brief explanation of its purpose and effect.

Contracts You Can't Enforce. Some interesting case-histories which show the advisability of a contractor getting his lawyer's advice before undertaking construction work outside his home state, even if for the federal government.

After the Agent for Service Is Gone. What will happen *then* if suit is brought against the company? Some examples taken from actual court cases, with full texts of the final decisions.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation.

Spot Stocks—and Interstate Commerce. Treats, in a general and informal way, of the relation between the carrying of goods in warehouses in outside states and the statutory obligations which that activity, in some states, places on the corporation owning the goods.

When a Corporation Leaves Home. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

We've Always Got Along This Way. A 24-page pamphlet giving brief digests of cases in various states in which corporation officials who had thought they were getting along very well with statutory representation by a business employe suddenly found themselves penalized in unusual and often embarrassing ways.

What! *We* Need a Transfer Agent? *Nonsense!* The foregoing is the title of a pamphlet which describes in detail, with many illustrations, the exact steps through which a stock certificate goes in being transferred from one owner to another by an experienced transfer agent.

Judgment by Default. Gives the gist of Michigan Supreme Court case of Rarden v. Baker and similar cases in other states, showing how corporations qualified as foreign in any states and utilizing their business employes as statutory representatives are sometimes left defenseless in personal damage and other suits.

THE CORPORATION TRUST COMPANY
120 BROADWAY, NEW YORK, N. Y.

After-the-war dialogs: "I put only a small part of my savings into War Bonds," says Mr. Mister, "as I wasn't sure of their being safe."

"You weren't sure of WHAT?" shouts the veteran who had lost both legs in battle.